

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

RICHARD JOHN KING,	)	CASE NO. C07-1562-BHS
	)	
Petitioner,	)	
	)	
v.	)	REPORT AND RECOMMENDATION
	)	
MAGGIE MILLER-STOUT,	)	
	)	
Respondent.	)	
_____	)	

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner is a state prisoner who is currently incarcerated at the Airway Heights Corrections Center in Airway Heights, Washington, pursuant to a 1993 judgment and sentence of the King County Superior Court. He has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 seeking to challenge that judgment and sentence. At this Court's direction, respondent filed an answer to the petition together with relevant portions of the state court record. The briefing is now complete, and this matter is ripe for review. This Court, having reviewed the petition, respondent's answer thereto, and the balance of the record, concludes that petitioner's federal habeas petition should be denied and this action should be dismissed with prejudice.

FACTS

The Washington Court of Appeals summarized the relevant facts and procedural history

01 of petitioner's state court criminal proceedings as follows:

02 On September 28, 1993, Richard King entered an Alford<sup>1</sup> plea to one count  
03 of first degree rape and one count of first degree robbery based on an incident on June  
04 14, 1993, and to one count of first degree rape with a deadly weapon and one count  
of first degree robbery with a deadly weapon based on an incident on September 2,  
1992. In discussing the potential sentence at the plea hearing, the prosecutor stated:

05 In addition to the time you will be serving in prison, the judge will sentence  
06 you to community placement. That will be for at least one year. I believe that  
the judge could go as high as two years, since this is a sex offense. Two years  
would be the maximum the judge could put you on community placement.

07 King's plea statement stated that "[t]he court may read the original and  
08 supplemental affidavit of Probable Cause to determine a factual basis to take this plea  
and for sentencing." These affidavits stated that in the June 14, 1993 incident, King  
09 "displayed a kitchen-type knife with an approximately eight-inch blade" and that King  
"was on Department of Corrections community custody for ... Attempted Rape when  
10 he committed his alleged acts of June 14, 1993," that "[i]n June 1992, [King] was  
transferred to community custody" after serving time in prison for attempted rape,  
11 that in the September 2, 1992 incident, King "held a knife to [the victim's] throat",  
and that "[t]he knife was approximately six inches long."

12 The State's calculation of King's offender score utilized the fact that he was  
13 on community placement when the crimes occurred. King exercised his right of  
allocution at sentencing. The court imposed concurrent high-end sentences for counts  
14 I, II and IV, to run consecutively with the sentence for count III. Defense counsel  
acknowledged that such a sentence was required by the Sentencing Reform Act of  
15 1981 (SRA). The court did not state the specific term of community placement. The  
Judgment and Sentence included the statutory requirement that King's sentence for  
16 these sex offenses include "community placement for two years or up to the period  
of earned release awarded pursuant to RCW 9.94A.150(1) and (2) whichever is  
17 longer."

18 King voluntarily withdrew his direct appeal in 1994. Years later, King filed  
a motion to amend the Judgment and Sentence under CrR 7.8. The trial court denied  
19 the motion on March 19, 2001. On appeal, the State conceded that the trial court  
erred in failing to specify the term of community placement. This court remanded for  
20 entry of the correct period of community placement.

21 \_\_\_\_\_  
22 <sup>1</sup> [Court of Appeals footnote 3] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27  
L.Ed.2d 162 (1970)

01 King argued for the first time at the hearing on remand that he had entered his  
02 Alford plea based on the prosecutor's statement that the maximum community  
03 placement term would be two years, and that because of this mutual mistake  
04 regarding the direct consequences of his plea, he should be able to receive specific  
05 performance of the two year community placement term. After King's attorney raised  
06 this issue, the following occurred:

07 THE COURT: Isn't there a difference between what the State recommends  
08 and what Mr. King asks the court to do and ultimately what the sentencing  
09 judge decides to do? The judge isn't bound by the –

10 THE DEFENDANT: Your Honor, may I respond to that?

11 THE COURT: No, you can't, actually, you have got an attorney.

12 THE DEFENDANT: Okay.

13 The court further stated:

14 [T]he issue to me is what am I going [to] do now, and . . . to the extent that  
15 I have discretion on remand, I would exercise my discretion and impose the  
16 longest term I could.

17 The court entered an Order Modifying Judgment and Sentence stating that under the  
18 pertinent statutes, King was subject to "a potential maximum period of Community  
19 placement of 42 months under Count I."

20 (Dkt. No. 15, Ex. 3 at 2-4.)

21 Petitioner appealed the Superior Court's order modifying his judgment and sentence to the  
22 Washington Court of Appeals. (*See id.*, Ex. 12.) The Court of Appeals affirmed petitioner's  
sentence but remanded the matter back to the trial court with instructions that an incorrect  
statement regarding good time credit be stricken from the judgment and sentence. (*Id.*, Ex. 3 at  
7.) Petitioner filed a motion for reconsideration, but that motion was denied. (*Id.*, Exs. 15 and  
16.)

Petitioner next filed a petition for review in the Washington Supreme Court. (*Id.*, Ex. 17.)

01 The Washington Supreme Court denied review without comment. (*Id.*, Ex. 18.) The Court of  
02 Appeals issued its mandate terminating review on February 2, 2007. (*Id.*, Ex. 19.) Petitioner now  
03 seeks federal habeas review of his sentence.

#### 04 GROUND FOR RELIEF

05 Petitioner asserts the following five grounds for relief in his federal habeas petition:

06 **Ground one:** My state and federal constitutional rights to a jury trial and to due  
07 process of law were violated when the sentencing court elevated the maximum  
08 possible penalty based on a finding that I was on community placement at the time of  
09 the offense.

10 **Ground two:** My state and federal constitutional rights to a jury trial and to due  
11 process of law were violated when the sentencing court imposed consecutive  
12 sentences based on a factual finding that my crimes were “separate and distinct.”

13 **Ground three:** Where sentencing error was predicated on the parties’ mutual  
14 mistake of law, the sentencing court erred in denying me my choice of remedies.

15 **Ground four:** My state and federal constitutional rights to a jury trial and to due  
16 process of law were violated when the sentencing court imposed a deadly weapon  
17 enhancement on Count 3 based on a judicial finding that I was armed with a deadly  
18 weapon during the crime’s commission.

19 **Ground five:** I did not knowingly, intelligently, and voluntarily waive my right to  
20 have the sentencing court determine whether I was armed with a deadly weapon  
21 during the commission of Count 3 because I was not advised in my Alford plea of my  
22 right to a jury determination of the enhancement.

(Dkt. No. 4 at 9-11, and 13.)

#### 18 DISCUSSION

19 Respondent concedes in her answer to the petition that petitioner exhausted his first,  
20 second and fourth grounds for federal habeas relief. Respondent asserts, however, that petitioner  
21 failed to fully and fairly exhaust his third and fifth grounds for relief. This Court need not address  
22 the exhaustion questions posed by petitioner’s third and fifth grounds for relief because failure to

01 exhaust does not necessarily preclude review by this Court. Section 2254(b)(2), provides that  
02 “[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the  
03 failure of the applicant to exhaust the remedies available in the courts of the State.” As explained  
04 in more detail below, this Court deems petitioner’s third and fifth grounds for relief to be without  
05 merit and therefore subject to denial even absent exhaustion.

06 Standard of Review

07 On federal habeas review, state court judgments carry a presumption of legality and  
08 finality. *McKenzie v. McCormick*, 27 F.3d 1415, 1418 (9th Cir. 1994), citing *Brecht v.*  
09 *Abrahamson*, 507 U.S. 619, 633 (1993). A writ of habeas corpus may issue only upon a finding  
10 that a prisoner is “in custody in violation of the Constitution or laws or treaties of the United  
11 States.” 28 U.S.C. § 2241(c)(3).

12 Under the Anti-Terrorism and Effective Death Penalty Act, a habeas corpus petition may  
13 be granted with respect to any claim adjudicated on the merits in state court only if the state  
14 court’s decision was *contrary to*, or involved an *unreasonable application* of, clearly established  
15 federal law, as determined by the Supreme Court, or if the decision was based on an unreasonable  
16 determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d) (emphasis  
17 added).

18 Under the “contrary to” clause, a federal habeas court may grant the writ only if the state  
19 court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law,  
20 or if the state court decides a case differently than the Supreme Court has on a set of materially  
21 indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362 (2000). Under the “unreasonable  
22 application” clause, a federal habeas court may grant the writ only if the state court identifies the

01 correct governing legal principle from the Supreme Court's decisions but unreasonably applies that  
02 principle to the facts of the prisoner's case. *Id.* The Supreme Court has made clear that a state  
03 court's decision may be overturned only if the application is "objectively unreasonable." *Lockyer*  
04 *v. Andrade*, 538 U.S. 63, 69 (2003).

05 Ground One

06 Petitioner asserts in his first ground for relief that his constitutional rights to a jury trial and  
07 to due process were violated when the trial court elevated the maximum possible penalty for his  
08 offense based on a finding that he was on community placement at the time of his offense.  
09 Petitioner maintains that because this finding increased his offender score and, thus, his sentencing  
10 range, the fact of his community placement had to be proven to a jury beyond a reasonable doubt.

11 In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court held that "any fact  
12 that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted  
13 to a jury and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. In *Blakely v.*  
14 *Washington*, 542 U.S. 296 (2004), the Supreme Court explained that "the 'statutory maximum'  
15 for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the*  
16 *facts reflected in the jury verdict or admitted by the defendant.*" *Blakely*, 542 U.S. at 303  
17 (emphasis in original). The Court went on to explain that "[i]n other words, the relevant 'statutory  
18 maximum' is not the maximum sentence a judge may impose after finding additional facts, but the  
19 maximum he may impose *without* any additional findings." *Id.* at 303-4 (emphasis in original).

20  
21 The Washington Court of Appeals rejected petitioner's claim that the trial court erred in  
22 using the fact that petitioner was on community placement in determining his sentence. (*See* Dkt.

01 No. 15, Ex. 3 at 5.) The Court of Appeals explained that because petitioner had specifically  
02 allowed the trial court to use the original and supplemental affidavits of probable cause “to  
03 determine a factual basis to take this plea and for sentencing,” neither *Apprendi* nor *Blakely*  
04 required that a jury find the facts relied upon by the trial court in determining petitioner’s sentence.  
05 (*See id.*)

06 Petitioner fails to demonstrate that this decision of the Washington Court of Appeals was  
07 contrary to, or constituted an unreasonable application of, clearly established federal law. The  
08 record is clear that petitioner expressly consented to the trial court’s use of the facts set forth in  
09 the original and supplemental affidavits of probable cause in determining petitioner’s sentence.  
10 (*Id.*, Ex. 20 at 5 and Ex. 23 at 19.) Among the facts set forth in those documents were that  
11 petitioner was on community custody at the time he committed all of the offenses charged in the  
12 amended information. (*Id.*, Ex. 22.) The trial court’s reliance on the fact that petitioner was on  
13 community custody in determining petitioner’s offender score therefore did not violate the  
14 principles announced in *Apprendi* and *Blakeley*. Accordingly, petitioner’s federal habeas petition  
15 should be denied with respect to his first ground for relief.

16 Ground Two

17 Petitioner asserts in his second ground for federal habeas relief that his constitutional rights  
18 to a jury trial and to due process were violated when the sentencing court imposed consecutive  
19 sentences based on a factual finding that his crimes were “separate and distinct.” The Washington  
20 Court of Appeals rejected this claim stating that “[t]he issue of the trial court’s consideration of  
21  
22

01 the separate and distinct nature of the crimes in sentencing is controlled by State v. Cubias.<sup>2</sup>

02 In *Cubias*, the Washington Supreme Court concluded that the imposition of consecutive  
03 sentences under state law, RCW 9.94A.589(1)(b), does not implicate the concerns addressed by  
04 the United States Supreme Court in *Apprendi* and *Blakely* because the imposition of such  
05 sentences does not increase the penalty for any single offense beyond the statutory maximum  
06 provided for the offense. *State v. Cubias*, 155 Wn.2d 549, 556 (2005). Petitioner cites to no  
07 United States Supreme Court precedent holding that consecutive sentences violate the principles  
08 announced in *Apprendi* and *Blakely*, and this Court is aware of none.

09 Moreover, the record before this Court reflects that petitioner, in pleading guilty to each  
10 of the charged offenses, admitted all of the facts necessary to support the sentence imposed by the  
11 trial court. (See Ex. 15, Exs. 20 and 22.) Accordingly, petitioner's federal habeas petition should  
12 be denied with respect to his second ground for relief.

### 13 Ground Three

14 Petitioner asserts in his third ground for relief that the sentencing court, on remand, erred  
15 in sentencing him to 42 months of community placement because the parties reasonably, though  
16 mistakenly, believed that petitioner's maximum term of community placement would be two years,  
17 and because petitioner was advised at the time he entered his plea that the maximum term of  
18 community placement would be two years. Petitioner maintains that this mutual mistake of law  
19 entitled him to specific performance of the term of community placement discussed at the time he  
20 entered his guilty plea.

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22 <sup>2</sup> [Court of Appeals footnote 8] 155 Wn.2d 549, 120 P.3d 929 (2005).



01 Federal habeas relief does not lie for errors of state law. *Lewis v. Jeffers*, 497 U.S. 764,  
02 780 (1990)(citing *Pulley v. Harris*, 465 U.S. 37, 41 (1984)). It is not the province of federal  
03 habeas courts to re-examine state court conclusions regarding matters of state law. *Estelle v.*  
04 *McGuire*, 502 U.S. 62 (1991); *Jeffries v. Blodgett*, 5 F.3d 1180, 1192 (9th Cir. 1993), *cert.*  
05 *denied*, 510 U.S. 1191 (1994). The state courts, in this instance, determined that petitioner was  
06 not entitled to specific performance as a matter of state law. Petitioner offers no compelling  
07 constitutional argument nor, in fact, any constitutional argument at all, to establish that federal  
08 habeas review of this claim is warranted. Accordingly, petitioner's federal habeas petition should  
09 be denied with respect to his third ground for relief.

10 Ground Four

11 Petitioner asserts in his fourth ground for relief that his constitutional rights to a jury trial  
12 and to due process were violated when the sentencing court imposed a deadly weapon  
13 enhancement with respect to count III of the information based on a judicial finding that he was  
14 armed with a deadly weapon during the commission of the crime. As noted in the discussion of  
15 petitioner's first ground for relief, petitioner expressly consented to the trial court's use of the  
16 facts set forth in the original and supplemental affidavits of probable cause in determining  
17 petitioner's sentence. (Dkt. No. 15, Ex. 20 at 5 and Ex. 23 at 19.) Among the facts set forth in  
18 the supplemental affidavit of probable cause was that petitioner was armed with a knife during the  
19 commission of the rape charged in count III of the amended information. (*Id.*, Ex. 22 at 6-8.) The  
20 trial court's reliance on the fact that petitioner was armed with a knife in imposing a deadly  
21 weapon enhancement with respect to count III of the amended information therefore did not  
22 violate the principles announced in *Apprendi* and *Blakeley*. Accordingly, petitioner's federal

01 habeas petition should be denied with respect to his fourth ground for relief.

02 Ground Five

03 Petitioner asserts in his fifth ground for relief that he did not knowingly, intelligently, and  
04 voluntarily waive his right to have the sentencing court determine whether he was armed with a  
05 deadly weapon during the commission of count III because he was not advised during his plea  
06 proceedings of his right to a jury determination of the enhancement.

07 Due process requires that a guilty plea be both knowing and voluntary. *Boykin v.*  
08 *Alabama*, 395 U.S. 238, 242 (1969). A guilty plea is voluntary only if the defendant was made  
09 fully aware of the direct consequences of the plea and the plea was not the result of threats,  
10 misrepresentations, or improper promises. *Brady v. United States*, 397 U.S. 742, 755 (1970).  
11 A guilty plea is intelligently made if the defendant was advised by competent counsel, was made  
12 aware of the true nature of the charges against him, and nothing in the record indicates that he was  
13 incompetent. *Id.* at 756. “[A] voluntary plea of guilty intelligently made in the light of the then  
14 applicable law does not become vulnerable because later judicial decisions indicate that the plea  
15 rested on a faulty premise.” *Id.* at 757.

16 At the time petitioner entered his guilty plea, the United States Supreme Court had yet to  
17 render its decisions in *Apprendi* and *Blakely*. Thus, it had yet to be established that petitioner had  
18 a right, arising under the Sixth Amendment, to a jury determination of the facts regarding the  
19 deadly weapon enhancement. *Brady* makes clear that petitioner cannot now challenge the validity  
20 of his guilty plea on the ground that he was not advised of rights which, at the time he entered his  
21 plea, had yet to be recognized. *See Brady*, 397 U.S. at 757. Accordingly, petitioner’s federal  
22 habeas petition should be denied with respect to his fifth ground for relief.

CONCLUSION

For the reasons set forth above, this Court recommends that petitioner's federal habeas petition be denied and that this action be dismissed with prejudice. A proposed order accompanies this Report and Recommendation.

DATED this 25th day of March, 2008.

A handwritten signature in black ink, appearing to read "Mary Alice Theiler", written over a horizontal line.

Mary Alice Theiler  
United States Magistrate Judge